UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ALLCO RENEWABLE ENERGY LIMITED, Plaintiff, v. MASSACHUSETTS ELECTRIC COMPANY D/B/A NATIONAL GRID, and ANGELA O'CONNOR, JOLETTE WESTBROOK and ROBERT HAYDEN, in their official capacity as Commissioners of the Massachusetts Department of Public Utilities, and JUDITH JUDSON, in her official capacity as Commissioner of the Massachusetts Department of Energy Resources, Defendants**.**	Case No. 1:15-cv-13515-PBS

ALLCO RENEWABLE ENERGY LIMITED'S
MOTION FOR FURTHER RELIEF AND NOTICE OF ADDITIONAL AUTHORITY

Pursuant to Local Rule 7.1(b)(3), Plaintiff Allco Renewable Energy Limited ("Allco"), by and through its counsel, respectfully provides notice of additional authority of the Federal Energy Regulatory Commission's order in *Windham Solar LLC*, 157 FERC ¶61,134 (November 22, 2016) which specifies minimum contract terms, and respectfully moves this Court for the following additional relief under 16 U.S.C. § 824a-3(h)(2)(B) in order to alleviate the continuing irreparable harm being suffered by Allco.

This Court has already held that the State Defendants acted unlawfully, and that Allco has no adequate remedy at law to compensate for the damage that Allco has suffered since 2011. Under 16 U.S.C. § 824a-3(h)(2)(B) Congress authorized this Court to "issue such injunctive or other relief as may be appropriate," when faced with the circumstances of this case.

More than four months after this Court's order invalidating the State Defendants' rule denying Allco its rights under federal law, the State Defendants have taken no action to address

Allco's rights under federal law. Without additional action from this Court, Allco will continue to suffer irreparable harm. "[W]hen there is proof of present irreparable harm, the court [should] act promptly rather than rely on the possibility of future prophylactic measures." *Semancik v. United Mine Workers*, 466 F.2d 144, 156-7 (3d Cir. 1972). "Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it." *Juliana v. United States*, No. 6:15-cv-01517-TC, 2016 U.S. Dist. LEXIS 156014, Slip Op. at 52 (D. Ore. November 10, 2016).

When FERC stated that "a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules," *FERC v. Mississippi*, 456 U.S. 742, 751 (1982), FERC was not intending to permit state commissions to deny generators their rights under federal law while the state commission took no action. A contrary conclusion would nullify the effect of every relevant FERC pronouncement including the one submitted herewith in *Windham Solar LLC*. *See also, Grouse Creek Wind Park, LLC*, 142 FERC P61,187 (2013) at ¶40 ("'seek[ing] state regulatory authority assistance to enforce the PURPA-imposed obligation' does not mean that seeking such assistance is a necessary condition precedent to the existence of a legally enforceable obligation.")

While Allco cannot be put back in the position it would have been in but for the State Defendants unlawful conduct, under this Court's express authority under 16 U.S.C. § 824a-3(h)(2)(B), some of the ongoing irreparable harm can be alleviated. The State Defendants have stated that they will not be adjudicating the dispute between Allco and National Grid, but rather intend to engage in a general rulemaking to implement PURPA in light of this Court's Order. Such a rulemaking will not address Allco's claims which arose in 2011.

The first additional relief needed to alleviate some of the ongoing irreparable harm to Allco is imposition of a deadline on the State Defendants to resolve Allco's case, either through adjudication or a rulemaking that addresses Allco's legally enforceable obligation from 2011. As the FERC confirmed in its order in *Windham Solar LLC*, a state commission "must recognize that a legally enforceable obligation exists and calculate the appropriate forecasted avoided cost rate pursuant to section 292.304(d)(2)(ii) of the Commission's regulations." *Windham Solar* at ¶5. Allco's legally enforceable obligation existed as of 2011 and Allco seeks additional relief requiring the State Defendants to determine the forecasted avoided cost rate as of 2011. Such additional relief is needed to insure that the State Defendant "recognize that a legally enforceable obligation exists and calculate the appropriate forecasted avoided cost rate." *Id*.

The second additional relief necessary to alleviate some of the ongoing irreparable harm to Allco is qualification for what was known as the SREC I program, which was a program administered by the State Defendants that specified a minimum value for ten years for the solar renewable energy credits ("SRECs") from the first 6 megawatts (DC) of any solar project located in Massachusetts. The SREC I program was in effect in 2011 when Allco's legally enforceable obligation arose with National Grid. Had the State Defendants and National Grid complied with their obligations under federal law, the first 6 megawatts (direct-current) of each of Allco's solar projects would have qualified for the SREC I program. The State Defendants closed the SREC 1 program in 2014, at which point the Massachusetts Department of Energy Resources instituted the SREC II program, which provided less value for SRECs, but still provided a minimum guarantee for 10 year. The SREC II program is also now closed.

The third element of additional relief necessary to alleviate some of the ongoing irreparable harm is based upon the FERC's decision in *Windham Solar LLC* where the FERC stated that the term a qualifying facility ("QF") is entitled to receive is at a minimum equal to the term necessary to obtain financing to build its facility. *See, Windham Solar LLC*, at ¶8. Dr. Lesser's undisputed affidavit states the financing of solar projects typically require a minimum term of 20 years. *See*, Lesser Aff. at P57, Mot. for Sum. Judg. App. 97) ("Solar projects are typically financed based upon power purchase agreement terms of between 20 and 30 years.") The minimum 20 year term also equals the length of term of all projects recently selected by the State Defendants from Massachusetts' current clean energy solicitation.

For the foregoing reasons, Allco requests the following additional relief:

1. this Court order the State Defendants to immediately proceed to resolve the dispute between National Grid and Allco, and to issue an order or rule adjudicating the dispute no later

than April 30, 2017;

2. this Court order the State Defendants to qualify Allco's QFs for the Massachusetts SREC I program;

3. this Court order the State Defendants to determine the long-term avoided cost rate for energy and capacity based upon conditions as they existed in 2011, which is when Allco was improperly denied its rights under federal law; and

4. this Court order the State Defendants to provide a contract term equal to no less than 20 years based upon the FERC's order in *Windham Solar LLC* and the expert testimony that this Court received in connection with Allco's motion for summary judgment;.

Allco's counsel has conferred with counsel for the State Defendants and National Grid. The State Defendants oppose the motion. Counsel for National Grid has not received direction from its client, but reserves the right to oppose the motion.

WHEREFORE, Plaintiff Allco requests that this Court grant its Motion for Further Relief.

Dated: February 3, 2017

/s/ Thomas Melone

Thomas Melone (admitted *pro hac vice*)
ALLCO RENEWABLE ENERGY LIMITED
77 Water St., 8th Floor
New York, NY 10005
Telephone: (212) 681-1120
Facsimile: (801) 858-8818
Thomas.Melone@AllcoUS.com

Attorney for Plaintiff

LOCAL RULE 7.1(A)(2) CERTIFICATE OF COMPLIANCE

I hereby certify that on February 3, 2017, I conferred with Timothy Casey, counsel for the State Defendants, who stated that the State Defendants will oppose this motion. I hereby certify that on February 3, 2017, I conferred with Mike Fitzpatrick, counsel for Defendant National Grid, who stated that he has not yet received direction from his client, but reserves the right to oppose the motion.

/s/ Thomas Melone
Thomas Melone

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of the filing to all counsel of record.

/s/ Thomas Melone
Thomas Melone

EXHIBIT A

157 FERC ¶ 61,134
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Colette D. Honorable.

Windham Solar LLC and Allco Finance Limited	Docket Nos. EL16-115-000
Windham Solar LLC	QF16-362-002
Windham Solar LLC	QF16-363-002
Windham Solar LLC	QF16-364-002
Windham Solar LLC	QF16-365-002
Windham Solar LLC	QF16-366-002
Windham Solar LLC	QF16-367-002
Windham Solar LLC	QF16-368-002
Windham Solar LLC	QF16-369-002
Windham Solar LLC	QF16-370-002
Windham Solar LLC	QF16-371-002
Windham Solar LLC	QF16-372-002
Windham Solar LLC	QF16-373-002
Windham Solar LLC	QF16-374-002
Windham Solar LLC	QF16-375-002
Windham Solar LLC	QF16-376-002
Windham Solar LLC	QF16-377-002
Windham Solar LLC	QF16-378-002
Windham Solar LLC	QF16-379-002
Windham Solar LLC	QF16-380-002
Windham Solar LLC	QF16-381-002
Windham Solar LLC	QF16-382-002
Windham Solar LLC	QF16-383-002
Windham Solar LLC	QF16-384-002
Windham Solar LLC	QF16-385-002
Windham Solar LLC	QF16-386-002
Windham Solar LLC	QF16-387-002

NOTICE OF INTENT NOT TO ACT AND DECLARATORY ORDER

(Issued November 22, 2016)

1. On September 12, 2016, as supplemented on September 26, 2016, Windham Solar LLC (Windham) and Allco Finance Limited (together, Petitioners) filed a petition for enforcement against Connecticut Public Utilities Regulatory Authority (Connecticut Authority) pursuant to section 210(h)(2)(B) of the Public Utility Regulatory Policies Act

of 1978 (PURPA).[1] Petitioners claim that the Connecticut Authority's August 24, 2016 final decision (Final Decision) violates the Commission's PURPA regulations regarding a qualifying facility's (QF) ability to sell pursuant to a legally enforceable obligation at a forecasted avoided cost rate.

2. Notice is hereby given that the Commission declines to initiate an enforcement action pursuant to section 210(h)(2)(A) of PURPA.[2] Our decision not to initiate an enforcement action means that Petitioners may themselves bring an enforcement action against the Connecticut Authority in the appropriate court.[3] We issue a declaratory ruling below, however, providing our views on a number of the substantive questions raised by the parties' pleadings.[4]

3. Petitioners argue that the Connecticut Authority erred by concluding that Windham is not entitled to a legally enforceable obligation at a forecasted avoided cost rate. Petitioners also disagree with the Connecticut Authority's determination that Eversource has no need for capacity.

4. The Commission's regulations expressly provide that "each" QF has the option to provide energy or capacity pursuant to a legally enforceable obligation.[5] Section 292.304(d)(1) of the Commission's regulations addresses the option to sell energy as available, while section 292.304(d)(2) of the Commission's regulations addresses the option to sell energy or capacity pursuant to a legally enforceable obligation over a specified term. Moreover, the former provides for an energy price based on avoided costs calculated at the time of delivery, while the latter provides (*at the QF's option*) for pricing based on either avoided costs calculated at the time of delivery

---

[1] 16 U.S.C. § 824a-3(h)(2)(B) (2012).

[2] 16 U.S.C. § 824a-3(h)(2)(A) (2012).

[3] 16 U.S.C. § 824a-3(h)(2)(B) (2012).

[4] The Administrative Procedure Act expressly provides for agencies to issue declaratory rulings, 5 U.S.C. § 554(e) (2012), and the Commission's regulations similarly provide for the Commission to issue such rulings. 18 C.F.R. § 385.207(a)(2) (2016).

[5] 18 C.F.R. § 292.304(d) (2016) ("Each qualifying facility shall have the option either: (1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either: (i) The avoided costs calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred.").

or at the time the obligation is incurred.[6] Thus, regardless of whether a QF can provide firm output, that QF has the option to sell its output pursuant to a legally enforceable obligation with a forecasted avoided cost rate.[7]

5. In its Final Decision, the Connecticut Authority concluded that Windham is only entitled to sell its output to Eversource pursuant to Rate 980, which provides an avoided cost rate that amounts to the real-time energy price for ISO-New England. The avoided cost rate provided by Rate 980 is the type of rate within the scope of section 292.304(d)(1) of the Commission's regulations. However, Windham has not opted to sell its output pursuant to section 292.304(d)(1) of the Commission's regulations. Rather, Windham has opted to sell its output pursuant to section 292.304(d)(2)(ii) of the Commission's regulations, which it is entitled to do (and at a rate based on avoided costs calculated at the time the legally enforceable obligation is incurred – which it is also entitled to do),[8] and, therefore, the Connecticut Authority must recognize that a legally enforceable obligation exists and calculate the appropriate forecasted avoided cost rate pursuant to section 292.304(d)(2)(ii) of the Commission's regulations.[9]

6. That being said, although state regulatory authorities cannot preclude a QF – even an intermittent QF – from obtaining a legally enforceable obligation with a forecasted avoided cost rate, we remind the parties that the Commission's regulations allow state

---

[6] *Compare* 18 C.F.R. § 292.304(d)(1) (2016) *with* 18 C.F.R. § 292.304(d)(2) (2016).

[7] *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 400 (5th Cir. 2014), suggested that, because only "firm power" QFs can provide certainty that "promised power actually will be produced and readily available," "it makes sense that only they should be able to select between the rate options" of avoided cost at the time of delivery and avoided cost when a legally enforceable obligation is incurred. This distinction, though, is not found in the Commission's regulations, and the states, as recognized by the court, are required to implement those regulations. *See id.* at 384-85; *accord* 16 U.S.C. § 824a-3(f) (2012). Rather, section 292.304(d) expressly provides that "[*e*]*ach* qualifying facility shall have the option…[t]o provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term," and "at the option of the qualifying facility" the rate may be based on "[t]he avoided costs calculated at the time the obligation is incurred." 18 C.F.R. § 292.304(d) (2016) (emphasis added).

[8] 18 C.F.R. § 292.304(d)(2) (2016).

[9] *Allco Renewable Energy Ltd., v. Mass. Elec. Co.*, No. 15-13515-PBS, 2016 WL 5346937, at *22 (D. Mass. Sept. 23, 2016) (even in restructured state, the risk is shared; as in any contract, the purchasing utility bears the risk that prices will decrease in the future below the originally set level, and the selling QF bears the corresponding risk that prices will increase above the originally set level).

regulatory authorities to consider a number of factors in establishing an avoided cost rate.[10] These factors which include, among others, the availability of capacity, the QF's dispatchability, the QF's reliability, and the value of the QF's energy and capacity, allow state regulatory authorities to establish lower avoided cost rates for purchases from intermittent QFs than for purchases from firm QFs.

7. The Connecticut Authority also has concluded that Eversource has no need for capacity because it is located in a restructured state and its capacity needs are met by ISO-New England Inc.'s forward capacity auction. However, to the extent that Eversource's capacity needs can be satisfied by Windham's QFs rather than through the capacity auction, the avoided cost rates available to Windham should include an estimate of Eversource's avoided cost of capacity. Connecticut Authority stated in its Final Decision that Eversource can self-manage up to 20 percent of its load, which suggests that Eversource may well have capacity needs that can be met outside of the capacity auction. Moreover, independent of Eversource's ability to self-manage, Eversource's reliance on ISO-New England Inc.'s forward capacity auction does not mean that Eversource has no need for capacity, but rather its reliance on the capacity auction demonstrates only that Eversource acquires capacity through that auction, and there is no indication that Eversource would be unable to realize the appropriate value of any capacity it acquires from a QF by simultaneously offering that capacity into the auction with its bids to purchase capacity from the auction.

8. Finally, the Commission has long held that its regulations pertaining to legally enforceable obligations "are intended to reconcile the requirement that the rates for purchases equal to the utilities' avoided cost with the need for qualifying facilities to be able to enter into contractual commitments, by necessity, on estimates of future avoided costs" and has explicitly agreed with previous commenters that "stressed the need for certainty with regard to return on investment in new technologies."[11] Given this "need for certainty with regard to return on investment," coupled with Congress' directive that

---

[10] 18 C.F.R. §§ 292.304(e)-(f) (2016).

[11] *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,880, *order on reh'g sub nom.* Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part vacated in part*, *Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

the Commission "encourage" QFs,[12] a legally enforceable obligation should be long enough to allow QFs reasonable opportunities to attract capital from potential investors.[13]

By the Commission.

Kimberly D. Bose,
Secretary.

---

[12] 16 U.S.C. § 824a-3(a) (2012).

[13] 18 C.F.R. § 292.304(d)(2) (2016) our regulations, do not, however, specify a particular number of years for such legally enforceable obligations.